

# INFORMATIVE NOTE

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## EU AND COMPETITION LAW

# PRELIMINARY RULING IN TELIASONERA MARGIN SQUEEZE CASE

On 17 February 2011, the Court of Justice (“ECJ”) issued its preliminary ruling in the TeliaSonera case regarding an alleged abuse of dominant position by way of a margin squeeze<sup>1</sup>.

### Background

TeliaSonera is the Swedish fixed telephone network operator and the owner of the Swedish fixed-line telecoms network. It used the network to sell its telecoms services to consumers, but also offered other operators access to its infrastructure in two ways. On the one hand, it offered unbundled access, in accordance with its obligations under EU law<sup>2</sup>. On the other hand, without being legally obliged to do so, TeliaSonera offered operators an ADSL product intended for wholesale users, this enabling the operators concerned to supply their broadband connection services to end users.

In the opinion of the Swedish Competition Authority (“Konkurrensverket”), between April 2000 and January 2003 TeliaSonera abused its dominant position to the extent that it applied a pricing policy under which the spread between the sale prices of ADSL products intended for wholesale users and the sale prices of services offered to end users was not sufficient to cover the costs which TeliaSonera itself had to incur in order to distribute those services to the end users concerned. For that reason, the Konkurrensverket brought an action before the Stockholm District Court alleging the infringement of competition rules.

In February 2009, the Swedish court requested the ECJ to issue a preliminary ruling on the case. The court asked the ECJ, in general, whether margin squeeze was a stand-alone abuse arising whenever the spread between input and retail prices was such as to prevent a competitor from making a profit or only when the input product was crucial to downstream competition.

### ECJ ruling

The ECJ has now ruled that margin squeeze is a separate category of abuse of dominance contrary to Article 102 of the Treaty on the Functioning of the European Union (“TFEU”), different from a refusal to supply.

The ECJ held that it was irrelevant that TeliaSonera was not subject to

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<sup>1</sup> Case C 52/09, *Konkurrensverket v TeliaSonera*, ECJ judgment of 17 February 2011.

<sup>2</sup> Regulation (EC) No 2887/2000 of the European Parliament and of the Council of 18 December 2000 on unbundled access to the local loop. OJ 2000 L 336, of 30.12.2000, p. 4-8.

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In its ruling, the ECJ, more than clarifying certain conditions for margin squeeze abuses to be found, confirmed that such abuses can take place in unregulated sectors and with respect to wholesale input not necessarily indispensable to compete on the downstream retail market.

a regulatory obligation to supply competitors. Furthermore, the ECJ stated that, although the indispensable nature of the wholesale product is relevant in assessing whether the pricing practice has anticompetitive effects, such effects cannot be ruled out even where the wholesale product is not indispensable.

As for the method for establishing a margin squeeze, the ECJ confirmed that, as a general rule, primarily the prices and costs of the dominant undertaking on the retail services market should be taken into consideration.

Concerning the required level of margin squeeze, the ECJ established that, if the margin is negative, (i.e. if the wholesale price charged by the dominant undertaking to competitors is higher than the retail price charged by the same company for services to end users), an effect which is at least potentially exclusionary is probable, considering that, in such a situation, competitors of the dominant undertaking, even if they are as efficient, or even more efficient, would be compelled to sell at a loss. If, however, the margin remains positive, it must then be demonstrated that the application of that pricing practice is likely to have the consequence

that it would be more difficult for the operators to trade on the market concerned.

The ECJ also confirmed that margin squeeze may constitute an abuse of a dominant position irrespective of both (i) the degree of dominance in the wholesale market and (ii) the existence of a dominant position on the associated retail market.

## Conclusion

In its ruling, the ECJ, more than clarifying certain conditions for margin squeeze abuses to be found, confirmed that such abuses can take place in unregulated sectors and with respect to wholesale input not necessarily indispensable to compete on the downstream retail market.

The judgment was contrary to the Opinion of Advocate General Mazák issued in September 2010 and to the European Commission's guidance notice on the enforcement of Article 102 TFEU. It moreover differs from the US position on market squeeze, which has narrowed its scope, and could therefore lead to different application of competition rules on each side of the Atlantic regarding the same pricing policy adopted by an undertaking.

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<sup>3</sup> Opinion of Advocate General Mazák, delivered on 2 September 2010, in Case C-52/09, *Konkurrensverket v TeliaSonera AB*.

<sup>4</sup> Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings. OJ C 45 of 24.2.2009, p. 7–20.